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IN THE

Supreme Court of the United States

GIL GARCETTI, ET AL.,

Petitioner,

v.

RICHARD CEBALLOS,

Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should a public employee's purely job-related speech be cloaked with First Amendment protection simply because it touches on a matter of public concern?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 3

ARGUMENT 4

I. Whatever Protections the First Amendment May Provide For Non-Job Related Speech, It Does Not Protect Job-Related Speech by Public Employees. 5

A. As Originally Understood, the First Amendment Did Not Prevent Public Employers From Disciplining Public Employees for Speech. 5

B. Contrary to the Ninth Circuit's Ruling, This Court's Decisions Do Not Require First Amendment Protection for Job-Related Speech. 7

C. Allowing Public Employers the Same Ability As Private Employers to Regulate Their Employees' Job-Related Speech Does No Real Harm to the Interests Protected by the First Amendment. 12

II. Applying The *Pickering/Connick* Balance to Job-Related Speech Imposes Serious Burdens on State and Local Governments. 17

A. Application Of The Public Concern Test to Job-Related Speech Inappropriately Strips From Public Employers the Necessary And Important Right Of Any Principal to Control the Speech of Its Agents. 18

B. Subjecting Job-Related Speech to the Public Concern Test Creates Significant Legal Uncertainty for Public Employers. 23

C. Subjecting Job-Related Speech To The Public Concern Test Impinges Upon The Prerogative Of State And Local Legislatures To Determine The Appropriate Scope Of Legal Protections Provided To "Whistleblowers." 25

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 16

Abrams v. United States, 250 U.S. 616 (1919) 16

Arnett v. Kennedy, 416 U.S. 134 (1974) 18

Ayers v. Western Line Consol. School Dist., 555 F.2d 1309 (5th Cir. 1977) 12

Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668 (1996) 24

Branti v. Finkel, 445 U.S. 507 (1980) 10

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 13

Carpenter et al. v. United States, 484 U.S. 19 (1987) 22

City of San Diego v. Roe, 543 U.S.___, 125 S. Ct. 521 (2004) ..... *passim*

Cohen v. California, 403 U.S. 15 (1971) 16

Conaway v. Smith, 853 F.2d 789 (10th Cir.1988) 23

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995) 4

Egger v. Phillips, 710 F.2d 292 (7th Cir.) *cert. denied*, 464 U.S. 918 (1983) 24

Elrod v. *Burns*, 427 U.S. 347 (1976) 10

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 13

Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 19, 21

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974)..... 24

Gillum v. City of Kerrville,
3 F.3d 117 (5th Cir. 1993) 7, 8,

Givhan v W. Line Consol. Sch. Dist.,
439 U.S. 410 (1979)..... 12

Herbert v. Lando, 441 U.S. 153 (1979)..... 14

Hustler Magazine v. Falwell, 485 U.S. 46
(1988)..... 16

Hutchinson v. Proxmire, 443 U.S. 111, (1979) 27

Kelley v. Johnson, 425 U.S. 238 (1976) 16

Koch v. City of Hutchinson, 847 F.2d 1436
(10th Cir. 1988), *cert. denied*, 488 U.S.
909 (1988)..... 4, 25

Linhart v. Glatfelter,
771 F.2d 1004 (7th Cir.1985) 23

Littman v. Firestone Tire & Rubber Co.,
715 F. Supp. 90 (S.D.N.Y. 1989) 29

Lynch v. Donnelly, 465 U.S. 668 (1984) 6

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995)..... 6

NAACP v. Alabama, 357 U.S. 449 (1958)..... 26

New York Times v. Sullivan,
376 U.S. 254 (1964)..... 27

Philadelphia Newspapers v. Hepps,
475 U.S. 767 ( )..... 27

Pickering v. Bd. of Education,
391 U.S. 563 (1968)..... *passim*

Rankin v. McPherson, 483 U.S. 378 (1987) 11

*Regan v. Taxation With Representation of
Wash.*, 461 U.S. 540 (1983)..... 9

Rosenberger v. Univ. of Va.,
515 U.S. 819 (1995)..... 9

Rust v. Sullivan, 500 U.S. 173 (1991)..... 9

Snepp v. United States, 444 U.S. 507 (1980)..... 22

Thomas v. Whalen,
51 F.3d 1285 (6th Cir. 1995) 22

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 27

United Pub. Workers v. Mitchell,
330 U.S. 75 (1974)..... 14, 15

*United States Civil Service Comm'n v. Nat'l
Ass'n of Letter Carriers*, 413 U.S. 548
(1973)..... 6, 7, 13, 14, 15

United States v. Treasury Employees,
513 U.S. 454 (1995)..... 11

Urofsky v. Gilmore,
216 F.3d 401 (4th Cir. 2000) 9, 18

Waters v. Churchill, 511 U.S. 661 (1994) ..... *passim*

Williams v. Rhodes, 393 U.S. 23 (1968)..... 17

STATE CASES

City of Houston v. Kallina, 97 S.W.3d 170
(Tex. App.-Houston [14 Dist.] 2002) 29

*Davidson v. Commonwealth, Dept. of Military
Affairs*, 152 S.W.3d 247 (Ky. App. 2004)..... 29

McAuliffe v. Mayor of New Bedford,
155 Mass. 216 (1892) 7

Raphael v. Okyiri, 740 A.2d 935 (D.C. 1999)..... 29

Taylor v. Memorial Health Systems, Inc., 770 So. 2d 752 (Fla. App. 5 Dist. 2000) 28

Vigil v. Arzola, 699 P.2d 613 (N.M. App. 1983), *rev'd on other grounds* 687 P.2d 1038 (N.M. 1984), overruled on other grounds, 777 P.2d 371 (1989) 28

FEDERAL STATUTES

5 U.S.C. 7324 (a) (2) 15

STATE STATUTES

Ark. Code Ann. § 21-1-601 et seq (2003) 28

Cal. Gov't Code § 53298(a) et seq (Deering 2003) 29

Conn. Gen. Stat. Ann. § 31-51m(b) (West 2003) 29

Fla. Stat. Ann. § 448.101-102 (West 1991 & Supp. 1995) 28

La. Rev. Stat. Ann. § 42:1169 (West 2003) 28

Miss. Code Ann. § 25-9-171 (2003) 28

N.M. Stat. Ann. § 28:17-19 (Michie 1996) 27

N.M. Stat. Ann. § 30-47-9 (Michie Supp. 1997) 27

N.M. Stat. Ann. § 50-9-25 (Michie 1993) 27

N.M. Stat. Ann. § 74-3-16 (Michie 1996) 27

Pa. Stat. Ann. tit. 43, §1422 (West 2003) 29

Va. Code Ann. §§ 8.01-216.8 (2002) 27

Va. Code Ann. §§ 32.1-138.4 (Michie 1997) 27

Va. Code Ann. §§ 40.1-51.2.1 (Michie 1994) 27

Va. Code Ann. § 54.1-515 (Michie 1994) 27

Va. Code Ann. §§ 63.2-1730 (Michie 1995) 27

Va. Code Ann. §§ 63.2-1731 (Michie 1995) 27

Vt. Stat. Ann. tit. III § 961 (1988) 27

Vt. Stat. Ann. tit XXI § 231 (1988) 27

Vt. Stat. Ann. tit. XXI § 232 (Supp. 1997) 27

Vt. Stat. Ann. tit. XXI § 494d (1988) 27

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Vt. Stat. Ann. tit. XXI § 1726 (1988 & Supp. 1997) 27

Vt. Stat. Ann. tit. XXXIII § 7508 (1991) 27

W. Va. Code, §6c-1-2 (1988) 29

Wash. Rev. Code Ann. § 42.41.010 et seq (West 2003) 29

Wis. Stat. 230.83(2) (2003) 29

MUNICIPAL ORDINANCES

Denver Mun. § 24-314 28

St. Paul Admin. Code § 42.01 27

San Antonio Mun. § 36-10 28

RESTATEMENTS

Restatement (Second) of Agency (1958)

§ 1 21

§ 2 19

§ 13 21

§ 380 21

§ 387 22

§ 404 22

Introductory Note (Ch. 7, Topic 2, Title B)..... 19

Introductory Note (Ch. 6, Topic 2)..... 22

MISCELLANEOUS

Aristotle, *Politics*, §9 14

4 W. Blackstone's Commentaries on the Laws of England 151-52 (2d rev. ed. 1872)..... 6

Callahan, Dworkin, & Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 Va. J. Int'l L. 879, 881-2 (Spring, 2004) 26

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Mill, *On Liberty*, in *On Liberty And Considerations On Representative Government* 1, 13-48 16

Milton, *Areopagitica* (London 1644), in 2 *Complete Prose Works Of John Milton* 486 passim (E. Sirluck ed. 1959)..... 16

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INTERESTS OF *AMICUS CURIAE*[1]

The Ninth Circuit below held that speech by governmental employees, even in the course of performing (or mis-performing) routine job duties, is entitled to First Amendment protection if it can be characterized as speech on a matter of public concern. That decision, if allowed to stand, will hamstring local governments in managing their employees, because government employee speech almost always touches upon issues of public concern.

The decision below will thus expose local governments to the expense, inconvenience and workplace disruptions of frequent litigation. And predicting the outcome of that litigation will be difficult, because the balancing of interests that the Ninth Circuit requires turns in large part on a court's view of: (1) the employee's motives; and (2) the societal significance of the employee's speech. Because both issues are subjective, *amicus's* members will be hard-pressed to formulate dependable management guidelines.

Finally, the decision below will upset the legislative judgments that state and local governments have made, in

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[1] The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

hundreds of statutes and ordinances, on the appropriate protection for public "whistleblowers."

SUMMARY OF ARGUMENT

I. Settled principles of agency law establish the right of any employer, public or private, to control the expressive activities of its agents when acting within the scope of their employment. The government's interest in controlling employee speech is no less compelling where the employee speaks off-duty but on job-related subjects and in a manner that associates his speech with of his employment. The Ninth Circuit's decision in this case strips all American governments, federal, State, and local, of their right under agency law to control such speech.

It does so, moreover, without justification in the First Amendment. The Free Speech Clause would never have been understood by its framers and ratifiers as deprecating the government's authority to control employment-related speech by its employees, in their identity as employees. Also, the core interests that animate the First Amendment are at most only weakly implicated by job-related speech. This Court's decisions, including *Pickering* v. *Bd. of Education*, 391 U.S. 563 (1968), *Connick* v. *Myers*, 461 U.S. 138 (1983), and their progeny, likewise provide no support for the Ninth Circuit's ruling. Although those decisions sometimes require courts to balance an employee's expressive interest against legitimate governmental interests when the employee wishes to speak on a matter of "public concern," they need not and should not be interpreted to apply to job-related speech.

II. For managers in public agencies, the Ninth Circuit's misreading of the public concern test, and the resulting application of the *Pickering/Connick* balancing test even to job-related speech, creates crippling uncertainties as to the scope of their authority. Virtually any management decision may be subject to judicial second-guessing. Concurrently, the subjective elements in the public concern test create uncertainty as to the likely outcome in any given case.

The Ninth Circuit below justified application of the public concern test to job-related speech by the public interest served by protecting government whistleblowers. That justification is inapt. As reflected in literally hundreds of whistleblower protection statutes, there are indeed circumstances in which society is well served by protecting those in a position to disclose wrongdoing or waste in government. But because that interest primarily involves law enforcement concerns, rather than First Amendment values, it is weaker than the government's interest in being able to supervise its employees. For the same reason, considerations of federalism and separation of powers counsel that the Court be cautious in supplanting state and federal whistleblower protection statutes.

STATEMENT OF THE CASE

Richard Ceballos, a Deputy District Attorney, in the routine performance of his duties, questioned the prosecution of a murder case and the veracity of a police officer's affidavit. He alleges that adverse employment actions were taken in response to this expressive conduct, and that those actions violate the First Amendment.

In the courts below, Ceballos invoked the two-step analysis established by this Court to determine whether adverse action taken against a public employee violates the First Amendment. The first step, the so-called "public concern test," determines whether the First Amendment applies at all. *Connick*, 461 U.S. at 146. Under this test, if it is determined that the employee spoke "as a citizen," and on matters of "public concern," his speech has First Amendment protection. *Id.* If his speech is found protected, a court must then balance the government's (and society's) managerial interests against the employee's (and society's) First Amendment interests (the "*Pickering/Connick* balance").

This Court has never held that public employee speech that constitutes routine job performance can pass the public concern test. The District Court below held that purely job-

related, on-the-job speech by definition cannot pass the public concern test and is therefore not subject to the *Pickering/Connick* balancing test. But the Ninth Circuit reversed, holding that even routine, on-the-job speech satisfies the public concern test if that speech touches on subjects of societal interest, and particularly where that speech includes alleged disclosure of official misconduct. Pet. App. 19. The Ninth Circuit's holding deepened an existing conflict among the circuits on this question.

ARGUMENT

This Court "has not specifically addressed the issue of whether speech in the course of and as a part of an employee's ordinary duties is or is not per se protected." *Koch* v. *Hutchinson,* 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988). Similarly, "it was, and is, not clear that when an individual presents himself as speaking in his capacity as a public employee, that his speech is protected." *DiMeglio* v. *Haines*, 45 F.3d 790, 805 (4th Cir. 1995).

We support Petitioner's view that speech that constitutes job performance by definition does not pass the public concern test, and that the Ninth Circuit's decision should for that reason be reversed. We also believe, however, that the correct definition of "job-related" speech to which the First Amendment does not apply is broader than purely on-the-job speech. Lest the Court decide this case on a basis that suggests a narrower understanding of that term, we explain below the analysis that in our view should guide the Court's decisions in this and similar cases.

Specifically, as discussed below in Section I, we believe the government's legitimate and essential managerial interests necessarily outweigh First Amendment concerns, and thus the public concern test can never be satisfied, if the employee has spoken (a) *as an employee* (rather than as a member of the general public) and (b) on issues *directly and substantially related to the subject matter of his employment.* Our shorthand term for speech that meets this definition is "job-related" speech. Further, and again contrary to the Ninth Circuit's opinion below, we do not believe that First Amendment concerns are significantly greater where job-related speech includes allegations of official wrongdoing. Section II explains why we believe this approach comports with sound public policy and federalism principles.

I. Whatever Protections the First Amendment May Provide For Non-Job Related Speech, It Does Not Protect Job-Related Speech by Public Employees.

In *Connick* this Court held that public employee speech concerning a personal employment grievance is not protected by the First Amendment. In so holding, the Court noted that speech of that description is a far cry from the kind of open debate on issues of public concern that primarily animates the First Amendment's guarantee of free expression. 461 U.S. at 148. The Ninth Circuit, misreading *Connick*, held below that First Amendment protection extends even to employee speech that occurs in the routine performance of job duties. The effect of that ruling is to subject almost any adverse employment decision by a public employer to constitutional scrutiny. Because that result is justified neither by the First Amendment's original purpose, nor by this Court's caselaw, nor by the values served by the First Amendment, the Ninth Circuit's decision represents an unwarranted imposition on the ability of public employers to manage their employees.

A. As Originally Understood, the First Amendment Did Not Prevent Public Employers From Disciplining Public Employees for Speech.

The Framers left us little evidence of their understanding of the First Amendment's Free Speech clause. The House debate is limited and not on point, and no record exists of debate in the Senate or in the various states during ratification. To determine the original meaning of the Free Speech clause, we must therefore examine accepted practices during the relevant times. *See Lynch* v. *Donnelly*, 465 U.S.

668, 673 (1984); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting).

As an initial matter, those practices demonstrate that the Framers did not understand the Free Speech clause as an absolute. As Justice Story famously put it, "That [the First] [A]mendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, ... is a supposition too wild to be indulged by any rational man." 3 J. Story, Commentaries on the Constitution of the United States § 993 (Boston: 1833); *see also* 4 W. Blackstone's Commentaries on the Laws of England 151-52 (2d rev. ed. 1872) ("The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure in criminal matter when published").

Consistent with that view, the practice of conditioning government employment on the relinquishment of free-speech rights was common and accepted from the earliest days of the republic until quite recently. As this Court recounted in *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973), a "spoils system," under which federal employment "depend[ed] upon party service and changing administrations, rather than meritorious performance," endured from the time of the American government's formation until after the Civil War. And President Jefferson, who famously argued for an absolute interpretation of First Amendment rights during the controversy over the Alien and Sedition Acts, did not view limits on public employees' free-speech rights as offensive to the Free Speech clause. Jefferson approved an order that broadly banned officers of the Executive Branch from participating in "electioneering" or in any way attempting "to influence the votes of others." *Id.* (quoting 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899)).

Until this Court's groundbreaking decisions in the 1950s and 1960s, the Court's "unchallenged dogma" permitted the government to condition employment upon a wholesale restriction of free speech. *Connick*, 461 U.S. at 143-44 (citations omitted). The prevalent view was perhaps best captured in Justice Holmes' famous dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220 (1892) (Holmes, J.).

To be sure, this Court has abandoned the Holmesian approach and extended some level of First Amendment protection to the speech of government employees. *See, e.g., Pickering*, 391 U.S. at 568. In so doing, however, the Court has continued to recognize the strong interests of state, federal and local governments in regulating their employees' speech. *Id.* ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."). Indeed, nothing in this Court's jurisprudence justifies an extension of First Amendment protections to the statements of a government employee who is speaking as an employee on job-related subjects.

B. Contrary to the Ninth Circuit's Ruling, this Court's Decisions Do Not Require First Amendment Protection for Job-Related Speech.

This Court's decisions provide no support for the Ninth Circuit's holding that job-related speech can pass the public concern test. That holding misconstrues the public concern test, as indicated by Judge O'Scannlain in his concurrence below (App. at 32 et seq.), and by the Fifth Circuit in *Gillum* v. *City of Kerrville*, 3 F.3d 117 (5th Cir. 1993). The *Gillum* court stressed that the public concern test does not "focus on the inherent 'importance' of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee." This focus "on the hat worn by the

employee when speaking rather than upon the importance of the issue," the court noted, "reflects the reality that at some level of generality almost all speech of state employees is of public concern." And, the court pointed out that its approach is additionally justified by misgivings about "an analytical path that takes judges so uncomfortably close to content based inquiries." 3 F.3d at 121 (citation omitted).

1. Under this Court's decisions, job-related speech that occurs on the job clearly is *per se* unprotected. First Amendment interests are absent here because the government acts as an employer, not as a sovereign. *See Waters* v. *Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("Constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign."). We know of no basis, either in the history of the First Amendment or in this Court's jurisprudence, for concluding that the Free Speech guarantee was intended to impair the government's authority as a principal to control the conduct of its agents acting within the scope of their duties.

A *per se* rule that First Amendment protections do not apply to on-the-job speech is also consistent with *Pickering* and its progeny. In *Pickering* itself, the Court held that the First Amendment protected a teacher's public criticism of the school board's efforts to raise public funding. The speech at issue was made off-duty, and was at most only remotely related to Mr. Pickering's job responsibilities. Similarly, in *Connick*, the Court found that the First Amendment did not apply to the efforts of an assistant district attorney who was unhappy with an announced job transfer, to drum up sympathy among her co-workers by circulating a questionnaire. Myers's job necessarily included the resolution of workplace issues and controversies with her co-workers and superiors.

Thus, as the *en banc* Fourth Circuit explained, this Court's decisions in *Pickering* and *Connick* "focus on the capacity of

the speaker" in recognition of the "basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, [but avoids] giving those employees a First Amendment right to dictate to the state how they will do their jobs." *Urofsky* v. *Gilmore*, 216 F. 3d 401, 407 (4th Cir. 2000) (en banc).

The power of the government to control the on-the-job speech of its employees is also supported by the entire line of cases dealing with restrictions on government-funded speech. For example, as this Court put it in *Rust* v. *Sullivan*, 500 U.S. 173, 199 (1991), "[t]he employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *See also Rosenberger* v. *Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee"); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ("Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [the Appellee's] lobbying.").

2. Although the Court need not reach the issue here, job-related speech should also be *per se* unprotected when it occurs away from the workplace. The government's interest in regulating on-the-job employee speech is no greater than its interest in regulating employee speech that, although occurring off-duty, is connected to the speaker's employment both by subject matter and by the speaker's self-identification as a government employee. This Court's First Amendment jurisprudence establishes the government's right to regulate speech that meets that description.

That off-the-job, job-related speech is *per se* unprotected by the First Amendment is shown by this Court's caselaw

approving patronage systems, under which employment can be made dependant upon party affiliation (and, thus, upon political beliefs), if party affiliation bears upon workplace efficiency. As the Court put it in *Branti* v. *Finkel*, 445 U.S. 507 (1980), "[i]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* at 517, *citing Elrod* v. *Burns*, 427 U.S. 347, 366 (1976). If "private political beliefs" can be regulated by the government as employer, off-duty speech can be regulated as well.

This Court's decisions in other First Amendment retaliation cases likewise support the application of a *per se* rule to off-duty speech that is linked to the speaker's identity as a government employee. In *City of San Diego* v. *Roe,* 543 U.S.___, 125 S.Ct. 521 (2004), for example, a city policeman was disciplined for, among other things, selling autoerotic videos. While the Court found that this and similar "speech" failed the public concern test because not on a "subject of legitimate news interest," (*Id.* at ___, 125 S. Ct. at 526) the Court also stressed that Roe's "use of [a police] uniform, [a] law enforcement reference in the Web site, [a] listing of the speaker as 'in the field of law enforcement,' and [a] debased parody of an officer performing indecent acts while in the course of official duties" all had the effect of "link[ing] his videos and other wares to his police work. . . " Because Roe "linked" his "speech" to his being a police officer, it "brought the mission of the employer and the professionalism of its officers into serious disrepute." 543 U.S. at ___, 125 S.Ct. at 524.

By contrast, the dispositive finding in *Pickering* was that Pickering's speech was only *indirectly* related to "the fact of [his] employment." 391 U.S. at 574. Likewise, in *United States* v. *Treasury Employees*, 513 U.S. 454 (1995) (*NTEU*), Justice Stevens, speaking for the majority, contrasted protected speech with speech by government employees in

"their official identities." 513 U.S. at 469. Similarly, Justice O'Connor in *NTEU* contrasted protected speech with "speech that by definition does not relate to . . . the employee's status as an employee." 513 U.S. at 480 (citation omitted). (O'Connor, J., concurring in part and dissenting in part). Finally, this Court has repeatedly suggested that the First Amendment does not apply where the employee speaks *as an employee*, by stressing that protection does apply where the employee speaks "as a citizen." *Pickering,* 391 U.S. at 568; *Connick*, 461 U.S. at 140, 154.

3. All of this Court's decisions *allowing* First Amendment protections for employee speech, moreover, involved non-job-related speech. *Connick* itself, for example, involved both job-related and non-job-related speech. One question in Myers's questionnaire asked whether her co-workers had been pressured into working on political campaigns. Because such pressure "constitutes a coercion of belief in violation of fundamental constitutional rights" (461 U.S. at 149 (citations omitted)), this speech touched upon an issue of public concern. At the same time, the issue was in no way connected to Myers's job duties. The subject matter of Myers's position as an assistant district attorney (*id.* at 137), was in no way related to political campaigning.

Similarly, in *Rankin* v. *McPherson*, 483 U.S. 378 (1987), a clerical employee was discharged for commenting that, after the unsuccessful attack on the President's life, she hoped the next attempt would succeed. The comment had nothing to do with Rankin's job. The Court therefore required that the employer carry the burden of proving that her discharge was justified for reasons of workplace efficiency and harmony.

The same was true in *Givhan v W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979). There the plaintiff was "a junior high English teacher." *Id.* at 411. Thus, her job duties in no way involved the subjects on which she had made the "demands" that had led her employer not to renew her employment contract, i.e.: "(1) that black people be placed in the cafeteria

to take up tickets, . . . ; (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps . . . workers be assigned semi-clerical office tasks instead of only janitorial-type work."). *Ayers* v. *W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977) (footnote omitted). Accordingly, this Court found her speech protected, and thus subject to the *Pickering/Connick* balance. *Givhan*, 439 U.S. at 410.

Finally, in *Pickering*, Pickering's letters to the editor criticizing School Board policies and communications were not job-related. Mr. Pickering was a teacher, with no involvement in the financing issues on which he spoke. The *Pickering* Court specifically grounded its holding on the finding that "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication." 391 U.S. at 574.

In short, this Court's decisions do not support application of the *Connick/Pickering* balancing analysis to any job-related speech, whether on-the-job or off-duty.

C. Allowing Public Employers the Same Ability As Private Employers To Regulate Their Employees' Job-Related Speech Does No Real Harm to the Interests Protected By the First Amendment.

The rule we advocate is consistent with the values that underlie the First Amendment. As noted by the plurality in *Waters* v. *Churchill*, "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." 511 U.S. at 672. While this Court has been justifiably chary of efforts to define the "fundamental maxims" of Free Speech, it is helpful, in analyzing the scope of First Amendment protections, to consider the rationales for freedom of expression which are: (1) the role that free and open discussion plays in a self-governing society — in other words, *society's* interest in open debate; (2) the right of free people to seek self-fulfillment *via* self-expression, both as a participant

in self-government, and more broadly, as a free personality; and (3) the search for truth.[2] Where job-related speech is involved, these core First Amendment values are relatively weak, and therefore inferior to the government's interest, as employer, in managing its employees' job performance.

1. *Society's political interests.* Protecting society's political discourse is the heart of the First Amendment. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978) (the Court's precedents have focused "not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas"); *Roe*, 543 U.S. at ___, 125 S. Ct. at 525 ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.").

Thus, one might well ask whether, if job-related speech is unprotected, the government's authority to regulate job-related speech will deny society potential contributions to public debate. This potential loss of contributions to the public debate, however, is at best minimal. It would involve at most only a limited number of people, and, in all but a very few cases, would be limited to a narrow range of subjects.

Moreover, this Court's cases rejecting First Amendment challenges to the Hatch Act (*Letter Carriers*) and analogous state statutes (*Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973)) stand firmly for the proposition that the public's interest in every citizen's political contributions is inferior to the government's interest in restricting political activity by employees for the sake of good government: "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in

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[2] *See generally* Emerson, *The System of Freedom of Expression* 6-7 (1970); F. Schauer, *Free Speech: A Philosophical Inquiry* (1982); Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212 (1983).

politics as party officers or workers, we see no constitutional objection." *Letter Carriers*, 413 U.S. at 555, *quoting United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99 (1974). There is no reason that state and local governments should be accorded less deference. On the contrary, principles of federalism require precisely the opposite.

2. *Political self-expression.* Denying First Amendment protection for job-related speech is also consistent with the value of encouraging political self-expression. The notion that active participation in civic affairs is essential to individual self-fulfillment in a free society is at least as old as Aristotle (*See* Aristotle, *Politics*, §9, ln.s 1253a1-3 ("Ανθροπον πολιτικον ξοον εστι")[3]), and has its modern-day champions.[4] But this Court has firmly established that the government, as employer, may impose broad restrictions on employees' political self-expression without offending the First Amendment.

In *Letter Carriers*, for example, the Court upheld the provision in the Hatch Act that barred any "employee in an Executive agency or an[y] individual employed by the government of the District of Columbia" from "tak[ing] an active part in political management or in political campaigns." *See* 5 U.S.C. 7324 (a) (2). Illustrating the extent of the Hatch

[3] "Man is a political animal." In other words, an essential component in man's full self-realization is participation in the affairs of the *Polis*. Interestingly, for Aristotle, speech itself is the proof. See id. at § 10 ("The reason why man is a being meant for political association . . .is evident. . . Nature . . . makes nothing in vain, and man alone of the animals is furnished with the faculty of language.") *The Politics of Aristotle*, E. Baker Trans., (Oxford 1976), at 5-6. *Compare Herbert v. Lando*, 441 U.S. 153, 183-184 n. 1 (1979) ("Freedom of speech is itself an end because the human community is in large measure defined through speech; . . . This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect.")

[4] See, e.g., A. Meiklejohn, *Free Speech And Its Relation To Self-Government*, 82-89 (1948); A. Meiklejohn, *Political Freedom*, 73-75 (1960).

Act's restraints on political self-expression, one of the plaintiffs in *Letter Carriers* had brought suit seeking permission for: "(1) participation as a delegate in conventions of a political party; (2) public endorsement of candidates of a political party for local, state and national office; (3) work at polling places on behalf of a political party during elections; (4) holding office in a political club." 413 U.S. at 553 n. 3.

This Court held that these and other essential forms of political participation could properly be barred, partly on the grounds that the statute left "untouched full participation by employees in political decisions at the ballot box...." and did not interfere with a "wide range of [other] public activities." *Letter Carriers*, 413 U.S. at 556, *quoting United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947); *see also Letter Carriers*, 413 U.S. at 575-576 ("[T]he Act specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.").

The import of *Letter Carriers* is that a government employee's First Amendment interest in political self-expression must yield "[i]f, in [the government's] judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers . . ." *Letter Carriers*, 413 U.S. at 555, *quoting United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 99 (1947). This is true, moreover, regardless of whether the speech in question is job-related. Because the government's legitimate interest in restricting job-related speech is obviously greater than its interest in restricting non-job-related speech, the rationale of *Letter Carriers* applies with even greater force to job-related speech.[5]

[5] To be sure, the First Amendment protects a wide range of individual self-expression beyond political expression. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). ("It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that

3. *The search for truth*. The rule we propose is also consistent with the First Amendment's truth-seeking role. Commonly traced to John Milton and John Stewart Mill,[6] the "truth-seeking function of the marketplace of ideas" (*Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988)) was most famously introduced to First Amendment jurisprudence by Oliver Wendell Holmes in *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, . . . That at any rate is the theory of our Constitution."). But it is important to identify the truth-seeking values implicated in these cases. The marketplace of ideas is most often thought of as an arena in which matters of policy are debated. The notion is not limited to matters of economics, politics, and the like, but it is in the context of debates on such subjects that the idea of a truth-seeking marketplace of ideas is most commonly invoked. See, e.g., *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of . . .the First Amendment freedoms.").

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expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection."). But in the broad sense of self-fulfillment, every employee, in taking a job, accepts a host of limitations on how he may present himself and behave. And this Court has never suggested that such restrictions pose any threat to First Amendment values. For example, the "Court [has] never expressed doubt that a government employer may bar its employees from using ... offensive [language] to members of the public, or to the people with whom they work."). *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) *discussing Cohen v. California*, 403 U.S. 15, 21-25 (1971); *cf. Kelley v. Johnson*, 425 U.S. 238 (1976) (approving restriction on police officer's hair length). In its broad, non-political sense, the First Amendment value in self-expression is therefore inferior, in the workplace, to an employer's interest in maintaining workplace efficiency and decorum.

[6] *See* J. Milton, *Areopagitica* (London 1644), in 2 *Complete Prose Works Of John Milton* 486 passim (E. Sirluck ed. 1959); J. Mill, *On Liberty*, in *On Liberty And Considerations On Representative Government* 1, 13-48 (R. McCallum ed. 1948)

This is not the kind of debate to which this Court's ruling would likely apply. Here, the issues raised by Ceballos had to do with proper administration of the DA's office and possible misconduct by a police officer. These matters no doubt have broad political and social implications, but their core significance is a matter of potential misfeasance (by Ceballos's superiors) and malfeasance (by the deputy sheriff), not broad issues of public policy. In this arena, then, First Amendment values are outweighed by public employers' legitimate and compelling interest in regulating job-related speech.

II. Applying the *Pickering/Connick* Balance to Job-Related Speech Imposes Serious Burdens on State and Local Governments.

The Ninth Circuit's approach, moreover, would impose enormous burdens on governments at all levels. In *Connick*, this Court held that employee speech that constitutes "an employee grievance concerning internal office policy" (461 U.S. at 154), as contrasted with "matter[s] of public concern" (*id.* at 146), enjoys no First Amendment protection. But some circuits, including the Ninth Circuit below, have transformed the holding of *Connick* into a sweeping rule that the First Amendment protects any and all employee speech that touches on matters of "public concern," *even if that speech constitutes job performance.* The resulting application of the *Pickering/Connick* balancing test to job-related speech would strip public employers of their necessary and legitimate ability under settled principles of agency law, to control the actions of their employees on matters within the scope of their agency. It would also create significant legal uncertainty for public employers, and effectively preempt the efforts of state and local legislatures to provide appropriate protections to whistleblowers.

A. Application of the Public Concern Test to Job-Related Speech Inappropriately Strips From Public Employers the Necessary and Important Right Of Any Principal To Control the Speech of Its Agents.

As Justice Powell put it in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974): "[I]f [it] is to perform its responsibilities effectively and economically . . . the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." 416 U.S. at 168 (Powell, J, concurring). The Ninth Circuit's analysis seriously undermines this authority. A ruling by this Court that job-related speech by government employees is not protected by the First Amendment will restore the ability of state and local governments to "perform [their] responsibilities effectively and economically."

In this case, for example, if an assistant district attorney refuses to follow the DA's instructions when making a public statement about an upcoming murder trial, "[i]t cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement." *Urofsky* 216 F. 3d at 407-408. While the subject of the speech is certainly of great public interest, the government as employer has a compelling interest in controlling how the employee does his job. For federal, state and local governments, it would be a disaster to "giv[e their] employees a First Amendment right to dictate to the state how they will do their jobs." *Id.* at 407. But by extending First Amendment protection even to "on-the-job, work-related speech," App. at 8 n. 4, the decision below confers precisely that right.

1. Principles of agency demonstrate that employees have no such right at common law. An employee, acting within the scope of his duties, speaks for his employer. A principal

necessarily has the power to control an agent's statements made on the principal's behalf. *See Restatement (Second) of Agency* (1958) ("*Restatement*"), Chapter 7, Topic 2, Title B, Introductory Note ("But it must not be overlooked that the relation of master and servant is a type of agency. All of the general agency principles are applicable to it."). *See also Gen. Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 392 (1982) ("'A master-servant relationship is a form of agency in which the master employs the servant as 'an agent to perform service in his affairs…'") *quoting Restatement* § 2 (citation omitted). Because the employee, as agent, speaks for his employer, any First Amendment restriction on the employer's ability to control that speech would amount to an assertion of constitutional rights by the employer against itself, an evident absurdity.

Ceballos's speech in this case concerned a decision whether to continue, or dismiss, a criminal prosecution, and potential misconduct by a police officer. For an assistant district attorney, such discussions are routine aspects of the job. On such matters a prosecutor's office must set and maintain a decision-making process that defines who has input and when. But the Ninth's Circuit's view would result in the employees having considerable authority to define that process, because their input, however inappropriate, will be constitutionally protected.

2. The government has an equally compelling interest in regulating speech that, while not constituting job performance, bears directly enough upon the subject matter of the employee's job that the manner or content of that speech, if inappropriate, will naturally have a direct, negative impact on the reputation or operations of the employer. The appropriate test was suggested in *Pickering* by the finding that "the fact of [Pickering's] employment is only tangentially and insubstantially involved in the subject matter of the public communication." *Pickering*, 391 U.S. at 574. Conversely, the burden on public authorities is considerably greater where the "fact of employment" is directly and

substantially "involved in the subject matter of the public communication."

The government's management prerogatives must encompass such off-duty speech lest meaningless distinctions dictate results. To illustrate, consider the following variations on the facts of the instant case:

1. Ceballos protests, directly to his superiors and co-workers, that a particular prosecution is ill-advised;
2. On the courthouse steps, speaking to reporters after a prosecution has been dismissed, Ceballos states his opinion that the prosecution had been ill-advised;
3. The day following a prosecution has been dismissed, Ceballos writes a letter to the editor stating his opinion that the prosecution had been ill-advised.

In examples (1) and (2), Ceballos is doing his job, and therefore the government has an obvious interest, as an employer, in deciding whether its agent is performing well or poorly. In (3) Ceballos is not doing his job, but no meaningful distinction can be drawn between (2) and (3), because the workplace impact of the speech is likely to be the same, if not greater. The employer's interest is therefore equally if not more powerful, and legitimately so. His speech, therefore, should be considered "job-related," just as it is in examples (1) and (2).

This conclusion is consistent with the plurality opinion in *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion) which recognized that the government's interest in controlling off-duty speech can be just as great as its interest in controlling speech that constitutes job performance: "[T]hough a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." Yet, on the Ninth Circuit's reasoning, under which *any* speech on topics of public concern is protected, the

President would have to justify, under First Amendment scrutiny, a decision to discharge a White House press secretary who publicly ridiculed the President's policies. That is absurd.

3. As we have noted, a second question that significantly implicates the employer's interests is whether the employee speaks in the *persona* of a government employee. Justice O'Connor's example of a "high ranking deputy" criticizing the governor's policies, *id.*, quite properly makes no distinction between on-the-job speech and off-duty speech. Instead, the governing aspect of "job-relatedness" in this example is the fact that a listener would associate the speech with the speaker's position as a government employee.

As employer-principals, state and local agencies have a powerful interest in regulating conduct that has the potential to bring "the[ir] mission . . . and the professionalism of [their] officers into serious disrepute." *Roe*, 543 U.S. at ___, 125 S.Ct. at 524; *See Restatement* § 380 ("[A]n agent is subject to a duty not to conduct himself with such impropriety that he brings disrepute upon the principal or upon the business in which he is engaged."). That potential exists wherever the employee's speech is linked to his position as government employee, and relates to the subject matter of his employment.

Principles of agency confirm the employer's right and need to control an employee's speech in the *persona* of the employee. An employee is a fiduciary. *Gen. Bldg. Contractors,* 458 U.S. at 393 ("At the core of agency is a 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control'"), *quoting Restatement* § 1; *Restatement* § 13 ("An agent is a fiduciary with respect to matters within the scope of his agency."). As a fiduciary, an employee cannot exploit for personal advantage knowledge – or even status – gained as an employee. *Carpenter* v. *United States,* 484 U.S. 19, 27-28 (1987); *Snepp* v. *United States*, 444 U.S. 507, 515-16 (1980)

(imposing constructive trust on sales proceeds from former CIA agent's book, partly on grounds of his breach of fiduciary duties).[7]

In short, the government as employer therefore must be able to regulate employee speech that is related to employment both by subject matter and by the speaker's wearing the mantle of his employment.[8] Thus, when a government employee speaks *as an employee*, and *on the subjects of his employment,* the government, as employer, has a compelling interest in being able to restrain speech that can have a negative impact on its operations and reputation.

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[7] Fiduciary principles apply equally where an employee seeks to exploit his *status* as an employee, as opposed to exploiting knowledge gained as an employee. *Cf. Restatement* § 404 & Comment b (agent liable to principal for use of principal's "assets," which include "good will, credit, and other intangible assets of the principal"); *id.* § 387 ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with the agency."). As noted by the Sixth Circuit: "[N]o court has recognized a right to exploit one's rank in public employment solely for the purpose of enhancing credibility for personal or political gain — in effect, to use the fact of public employment as a 'soap box' from which the employee can advocate a political position on an issue of public debate." *Thomas* v. *Whalen*, 51 F.3d 1285, 1291 (6th Cir. 1995). This accords with this Court's emphasis in *Roe* upon the fact that Roe "linked" his speech to his status as a police officer. 543 U.S. at ___, 125 S.Ct. at 524. Like the police officer in *Whalen*, who exploited his position to promote his political views, Roe effectively misappropriated the fact of his police employment to promote his wares. *Id.* at 526 ("Roe's expression was . . .designed to exploit his employer's image.").

[8] This conclusion accords with the principle of agency law that governs partially disclosed principals. The pertinent rule is that an agent binds his principal, even though he "makes . . . promises in the first person," and even though "the name of the principal is not specifically mentioned," so long as: (1) "the other person *knows the agent to be an employee* or representative of the principal *and [2] the transaction is one within the area of the principal's business.*" *Restatement*, Ch. 6, Topic 2, Introductory Note (emphasis added).

Moreover, the government's interest in regulating speech that meets that description is no weaker than its interest in regulating on-the-job speech.

B. Subjecting Job-Related Speech to the Public Concern Test Creates Significant Legal Uncertainty for Public Employers.

The Ninth Circuit's approach is also problematic because virtually any job-related speech by a public employee touches on matters of "public concern" (as the Ninth Circuit uses that term), and because the resulting First Amendment scrutiny of almost any adverse employment action premised on a public employee's job-related speech will produce unpredictable results.

Unpredictability is inevitable, first, because the public concern test hangs, in many cases, on the question of the speaker's intent. *See, e.g., Conaway* v. *Smith*, 853 F.2d 789, 796 (10th Cir. 1988) (Issue is whether plaintiff's speech "was calculated to disclose misconduct" or to inspire public debate on some issue of significant public interest); *Linhart* v. *Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (*Connick* "requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").

The importance of the speaker's intent under the public concern test, moreover, underscores the need for deference to managerial judgments where job-related speech is involved. Where a manager, based on months or years of interaction with an employee, and intimate knowledge of the circumstances, concludes that an employee's criticisms reflect intolerable insubordination, or poor judgment, or are intended (inappropriately) to advance personal interests, it makes little sense for a court, on the basis of a few day's testimony, to second guess that judgment.

Application of the public concern test will also be unpredictable because it will often reflect a court's personal view of the social or political importance of the "public" issue. *See, e.g., Egger* v. *Phillips*, 710 F.2d 292, 316-17 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983). ("[I]n assessing whether the speech touches upon a matter of public concern, it is important not to equate the public's curiosity about a matter with *a matter having societal ramifications*") (emphasis added). In related contexts the Court has anticipated, and attempted to avoid, this very problem. In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that First Amendment limits on liability for defamation should be determined on the basis of whether the plaintiff is a public figure, not whether the plaintiff's speech addressed a subject of public concern. The Court noted the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not," and expressed "doubt [about] the wisdom of committing this task to the conscience of the judges." 418 U.S. at 346.

Finally, the public concern test is easily manipulated by employees. Indeed, Myers's questionnaire in *Connick* may have included a question about political abuses specifically to put a patina of public concern on an initiative that "is most accurately characterized as an employee grievance concerning internal office policy." *Connick*, 461 U.S. at 154.

The unpredictability of results in these cases makes it impossible for state and local governments to provide reliable guidance to their managers, and also multiplies the amount of time and resources those managers must devote to defending lawsuits instead of doing their jobs, because "[u]ncertainty breeds litigation." *Bd. of County Comm'rs, Wabaunsee County, Kansas* v. *Umbehr*, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting).

C. Subjecting Job-Related Speech to the Public Concern Test Impinges Upon the Prerogative of State and Local Legislatures to Determine the Appropriate Scope of Legal Protections Provided to "Whistleblowers."

Application of the public concern test to job-related speech also impinges upon the legislatures' prerogative to determine the nature and scope of protections for "whistleblowers." Like this case, a significant number of all First Amendment retaliation cases involve alleged whistleblowing. Indeed, in their efforts to invent workable limitations on the potentially unlimited scope of the *Connick/Pickering* balance, some lower courts have somewhat arbitrarily announced that the public concern test is particularly designed for the benefit of government whistleblowers. *See Koch*, 847 F.2d at 1445-46 ("After *Connick*, many courts have particularly focused on the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties") (15 citations omitted). The Ninth Circuit below adhered to this philosophy. App. A at 19 ("[T]he decisive question is whether the employee spoke with the intention of bringing wrongdoing to light…").

Without question, there are circumstances in which the public's interest in disclosure of government waste or wrongdoing is superior to its interest in the unhampered functioning of its agencies. But the fact that job-related speech includes whistleblowing does not, as the Ninth Circuit suggests, add decisive weight to its claim to First Amendment protection.

1. The interests promoted by whistleblower protection laws are principally those of law enforcement and government efficiency, not the protection of speech. As noted in one comprehensive review of whistleblower legislation, whistleblowing "is viewed as a mechanism to regain societal

control over the large organizations that have come to dominate the global community." Legislative protections for whistleblowers are therefore designed to "empower[] an individual to report mistakes or wrongdoing to a person or agency that can correct the problem." The purposes of this empowerment have to do, however, with effective law enforcement, not free speech values, because the goals of protection are: (a) "exposing misconduct," (b) "allow[ing] for early detection and reduction of harm," (c) "reduc[ing] the necessity for and expense of public oversight and investigation," and (d) "deter[ring] malfeasance." Callahan, Dworkin, & Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 Va. J. Int'l L. 879, 881-2 (Spring, 2004). These are not constitutional interests.[9]

To be sure, in some cases whistleblowing may also involve commentary on broad political issues. However, in the more common situation, as in this case, the public interest in protecting whistleblowing is based upon law-enforcement needs, not constitutional norms. We do not protect the whistleblower in cases such as this one because blowing the whistle on one's superiors or co-workers is essential either to society's political discourse or to its members' self-fulfillment.[10]

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[9] That the First Amendment is not intended as a tool for detecting misconduct is shown by the fact that privilege laws routinely enforced by this Court give to several classes of citizens — including attorneys, psychiatrists, priests, and accountants — a positive duty to withhold evidence of wrongdoing. We are aware of no decision suggesting that the validity or scope of privileges such as these depends upon their passing any form of First Amendment scrutiny. Similarly, the First Amendment free association clause confers a privilege to refuse disclosure of membership in organizations, *see NAACP v. Alabama*, 357 U.S. 449, 462 (1958), and the Fifth Amendment provides the accused a constitutional right to withhold evidence of wrongdoing.

[10] It is true that, in *Connick* (461 U.S. at 148) this Court observed in *dicta* that "Myers did not seek . . . to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others,"

Because it is not readily apparent that First Amendment values are substantially implicated in whistleblower speech, the Ninth Circuit erred in suggesting that the presence of whistleblowing necessitates constitutional scrutiny in cases of job-related speech by public employees. That conclusion is all the more compelling where, as we now show, imposition of constitutional scrutiny would run contrary to federalism and separation of powers concerns.

2. All fifty states, and the District of Columbia, have enacted whistleblower protection laws.[11] The need for

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suggesting that whistleblowing may implicate First Amendment concerns. We submit, however, that the goals of whistleblower protection legislation indicate that the presence of whistleblowing does not provide an appropriate trigger for First Amendment scrutiny.

Also, while *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) certainly establishes that society has a strong First Amendment interest in the *media's* freedom to criticize public officials robustly (*see Time, Inc.* v. *Firestone*, 424 U.S. 448, 456 (1976) (discussing the "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"); *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767, 777 (1986) ("the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern,") the Court has never held that *New York Times v. Sullivan*, or its progeny, applies to non-media defendants. *Id.* at 794 n. 4; *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 f n. 16 (1979).

[11] Forty-seven states, and the District of Columbia, have adopted whistleblower legislation that provides general protection to government employees. *See* Westman & Modesitt, Appendix A, 281-307. In the three remaining states, New Mexico, Vermont and Virginia, several whistleblower protection laws target specific provisions of law or industries. See N.M. Stat. Ann. § 28:17-19 (Michie 1996); N.M. Stat. Ann. § 30-47-9 (Michie Supp. 1997); N.M. Stat. Ann. § 50-9-25 (Michie 1993); N.M. Stat. Ann. § 74-3-16 (Michie 1996); Vt. Stat. Ann. tit. III § 961 (1988); Vt. Stat. Ann. tit XXI § 231 (1988); Vt. Stat. Ann. tit. XXI § 232 (Supp. 1997); Vt. Stat. Ann. tit. XXI § 494d (1988); Vt. Stat. Ann. tit. XXI § 495 (1988 & Supp. 1997); Vt. Stat. Ann. tit. XXI § 1726 (1988 & Supp. 1997); Vt. Stat. Ann. tit. XXXIII § 7508 (1991); Va. Code Ann. §§ 40.1-51.2.1 (Michie 1994); Va. Code Ann. §§ 63.2-1730 (Michie 1995); Va. Code Ann. §§ 8.01-216.8 (2002); Va. Code Ann. §§ 63.2-1731 (Michie 1995); Va. Code Ann. §§ 32.1-138.4 (Michie 1997); Va. Code

respecting legislative prerogatives, and state sovereignty, is highlighted by the fact that states and local governments have taken a wide variety of approaches in attempting to balance employee protection against management prerogatives.

The Florida whistleblower statute, for example, requires that the employee show that there is, in fact, a violation of a statute. *See Taylor* v. *Memorial Health Systems, Inc.*, 770 So.2d 752, 754 (Fla. App. 5 Dist. 2000) (interpreting Fla. Stat. Ann. § 448.101-102 (West 1981 & Supp. 1995)). Eleven states' statutes (Florida, Idaho, Indiana, Louisiana, Maine, Massachusetts, New Jersey, New Hampshire, New York, Ohio, and Wyoming) limit protection to employees who first inform their employer, and allow the employer the opportunity to correct the problem, before contacting external authorities. Daniel P. Westman & Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge*, 69-70 (2d ed. 2004).

Ann. § 54.1-515 (Michie 1994). In addition, courts in these three states have created public policy exceptions to the at-will employment doctrine which, in at least one instance, extends protection to whistleblowers. *See, e.g., Vigil v. Arzola*, 699 P.2d 613 (N.M. App. 1983), *rev'd on other grounds*, 687 P.2d 1038 (N.M. 1984), overruled on other grounds, 777 P.2d 371 (1989) (protecting employee who reported inappropriate use of federal funds).

While our discussion of this issue will focus on *state* whistleblower protection statutes the arguments are fully pertinent to local governments as well. Several municipalities have adopted ordinances that protect whistleblowers. See, *e.g.*, St. Paul Admin. Code § 42.01 (protecting city employees who, in good faith, report violations of any law or regulation); San Antonio Mun. § 36-10 (protecting any employee, applicant or customer from retribution for reporting a violation of a particular city ordinance); Denver Mun. § 24-314 (same). In addition, state statutes commonly extend whistleblower protections to municipal, as well as state, employees. See, *e.g.*, Ark. Code Ann. § 21-1-601 et seq. (Michie 2003); La. Rev. Stat. Ann. § 42:1169 (West 2003); Miss. Code Ann. § 25-9-171 et seq. (2003).

The New Jersey and Texas whistleblower statutes, by contrast, have been construed to apply only where illegal activity that harms the public is involved, and thus not to internal policies. *Littman* v. *Firestone Tire & Rubber* Co., 715 F. Supp. 90, 93 (S.D.N.Y. 1989); *City of Houston v. Kallina*, 97 S.W.3d 170, 174 (Tex. App.-Houston [14 Dist.] 2002). States have also taken differing approaches to allocating the burden of proof. *Compare Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004) *with Raphael v. Okyiri*, 740 A.2d 935, 957 (D.C. 1999). And in some states, protection is withdrawn where the whistleblower acts in "consideration of personal benefit." Pa. Stat. Ann. tit. 43, §1422 (West 2003); W. Va. Code, §6c-1-2 (1988). Wisconsin protects those acting for gain only if the government has offered the award to improve administration or operations. Wis. Stat. 230.83(2) (2003).[12]

For all these reasons, any attempt to base First Amendment protections on the public interest potentially served by protecting whistleblowers threatens to interfere with an extensive range of carefully made legislative policy judgments. Yet there is no compelling justification for such interference, because the values primarily at stake — ferreting out waste and wrongdoing in government — are not constitutional values. Where as here constitutional values are at most only weakly implicated, this Court would do well to refrain from extending constitutional scrutiny into areas where legislative efforts have been so extensive.

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[12] Some States have also adopted whistleblower statutes that apply specifically to the employees of municipal governments. *See, e.g.*, Cal. Gov't Code § 53298(a) et seq. (Deering 2003); Wash. Rev. Code Ann. § 42.41.010 et seq. (West 2003). In some cases, these States have concluded that greater protection is appropriate for employees of lower levels of government than for employees of the State. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-51m(b) (West 2003).

Judicial restraint is all the more fitting where, as here, legislatures are better equipped than courts to determine the circumstances in which employees' job-related criticisms of their employer should be protected, and the extent of that protection. Unlike the judiciary, legislatures can (and do) address the problem in a comprehensive manner that makes appropriate distinctions between types of employees, types of criticisms, areas of employment, and other relevant factors. Judges, by contrast, will have to balance the competing values on a case-by-case basis, yielding results that are less consistent and less predictable than those typically produced where standards are spelled out by statute. The Ninth Circuit's approach thus unnecessarily over-rides the policy decisions that federal, state and local legislatures have crafted in literally hundreds of statutes and ordinances, in an area well-suited to legislative decision-making.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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